STATE OF MICHIGAN

COURT OF APPEALS

CARL WILKINSON and JEANETTE WILKINSON, Plaintiffs-Appellees, v ANTHONY LEE and GENERAL MOTORS CORPORATION, Defendants-Appellants.	UNPUBLISHED March 27, 2001 No. 203218 Oakland Circuit Court LC No. 94-487015-NI ON REMAND

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

This case is on remand from our Supreme Court. On original submission, this Court (Markey, P.J., dissenting) reversed the judgment of the trial court, concluding that defendants were entitled to a directed verdict or judgment notwithstanding the verdict on the issue of causation. *Wilkinson v Lee*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 1999 (Docket No. 203218). Our Supreme Court reversed and remanded for consideration of defendants' remaining argument. *Wilkinson v Lee*, 463 Mich 388; 617 NW2d 305 (2000). We have considered defendants' remaining argument, and now affirm the judgment of the lower court.

Defendants contend that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict because reasonable minds could not conclude that plaintiff Carl Wilkinson's[1] tumor symptoms and neck injuries constituted a serious impairment of body function. We disagree. Because this case was filed before "tort reform" took effect on March 28 and July 26, 1996, this issue must be analyzed under the law that existed at the time this action was filed.

Section 3135(1) of the no-fault act, MCL 500.3135; MSA 24.13135, permits plaintiff to sue in tort for noneconomic damages from a negligent owner or operator of a motor vehicle only if the person has suffered: (1) death, (2) serious impairment of body function, or (3) permanent

[1] Jeanette Wilkinson's claims are derivative, and we will refer to Carl Wilkinson as "plaintiff."

serious disfigurement. MCL 500.3135(1); MSA 24.13135(1); *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995). Before March 28, 1996, *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), was the controlling precedent. In *DiFranco, supra* at 39, 67, our Supreme Court held that to recover for noneconomic loss damages, the plaintiff had to prove that (1) the injuries he sustained in the accident impaired one or more body functions, and (2) that the impairment was serious. The focus was not on the injuries themselves but on how the injuries affected a particular body function. *Id*. at 67. To determine whether an impairment of body function was serious, the following factors were considered: the extent of the impairment, the particular body function impaired, the length of time of the impairment, the treatment required to correct the impairment, and any other relevant factors. *Id*. at 67-70; *Owens v City of Detroit*, 163 Mich App 134, 138; 413 NW2d 679 (1987). To be serious, the impairment need not have been of an "important" body function or of the entire body. *DiFranco, supra* at 39; *Richards v Pierce*, 162 Mich App 308, 314; 412 NW2d 725 (1987). "A comparison of the plaintiff's abilities and activities before and after the accident may be relevant insofar as it establishes the existence, extent, and duration of an impairment of body function." *DiFranco, supra* at 68. An impairment need not be permanent to qualify as serious under the statute. *Id.; Richards, supra.*

The question whether the plaintiff has satisfied the no-fault threshold is ordinarily one for the trier of fact. In *DiFranco*, the Court held that if reasonable minds could differ as to whether a particular injury exceeds the tort threshold, the issue is one of fact to be resolved by the jury:

> The question whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer. This is true even where there is no material factual dispute as to the nature and extent of the plaintiff's injuries. [*Id*. at 38.]

However, where reasonable minds could not differ as to the seriousness or nonseriousness of the injury, the threshold issue is one of law for the court:

> [I]n certain instances, the trial court should decide as a matter of law whether the plaintiff had, or had not, established a threshold injury. Such a decision could be made where "it can be said with certainty that no reasonable jury could view a plaintiff's impairment as serious." If the injury was "so minor" or of a "clearly superficial nature," summary disposition should be granted to defendant. [*Id*. at 51-52; *Gagliardi v Flack*, 180 Mich App 62, 69; 446 NW2d 858 (1989) (citations omitted).]

Finally, pursuant to *DiFranco* and it progeny, trial and appellate courts, when reviewing motions for directed verdict and judgment notwithstanding the verdict, must view the evidence in the light most favorable to the nonmoving party, and determine: "(a) whether a material factual dispute exists as to the nature and extent of the plaintiff's injuries, and (b) whether reasonable minds could differ regarding whether the plaintiff had sustained a serious impairment of body function." *DiFranco, supra* at 38-39; see, also, *Beasley v Washington*, 169 Mich App 650, 659; 427 NW2d 177 (1988).

Given the testimony that plaintiff had severe difficulty performing his job, experienced debilitating symptoms from at least late 1993 to February 1994 and continuing symptoms after the tumor was removed, saw his family physician on at least eight occasions, and underwent surgery to alleviate the symptoms, reasonable minds could differ regarding whether plaintiff's tumor symptoms sere serious. See *Beard v City of Detroit*, 158 Mich App 441, 449-450; 404 NW2d 770 (1987). Therefore, the threshold issue whether plaintiff's head injuries amounted to a serious impairment of body function was properly submitted to the jury.

Unlike plaintiff's tumor symptoms, however, we believe that reasonable minds would agree that plaintiff's neck injuries were not "serious." Six days after the accident, plaintiff saw Dr. Michael Fugle, an orthopedic surgeon, complaining of severe neck pain, Subsequently, on June 5, 1992, plaintiff saw Dr. Fugle again, at which time Dr. Fugle diagnosed plaintiff with "cervical myotis" and "severe cervical spasm" and recommended that he begin physical therapy. Plaintiff began his first physical therapy session on July 11, 1992. After approximately twelve treatments, consisting of hot pack and neck massages, therapy was discontinued in July 1992. Although plaintiff testified that he continued to complain of neck pain, he did not seek additional treatment. In addition, unlike plaintiff's tumor symptoms, there is no evidence indicating that the neck pain significantly impaired his ability to perform his work. Therefore, considering the factors enunciated in *DiFranco*, including treatment that consisted of no more than hot packs and massages and the absence of evidence indicating that as a result of the injuries a particular body function was impaired, we conclude that reasonable minds would agree that plaintiff's neck injuries did not constitute a serious impairment of body function.

We note that the verdict form does not indicate whether the jury awarded damages to plaintiff based on the tumor symptoms, neck injuries, or both. By failing to request a jury form requiring the jury to differentiate between the injuries, defendants have provided us with no avenue for review. Therefore, this issue has been waived. *Phinney v Perlmutter*, 222 Mich App 513, 559; 564 NW2d 532 (1997).

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer